No. 9020.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a National Banking Association,

Appellee.

APPELLEE'S FURTHER BRIEF.

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ANAHEIM FIRST NATIONAL BANK, a National Banking Association,

Appellee.

APPELLEE'S FURTHER BRIEF.

Introductory.

This, Appellee's Further Brief, is an answer to Appellants' Opening Brief, which was filed on or about July 7, 1939, pursuant to a court order made by the above-entitled court under date of May 10, 1939.

It will be remembered that briefs had already been filed in this appeal by the respective parties. The court,

however, in view of appellants' defective record, authorized, by its said order, the preparation and filing of a Supplemental Transcript of Record (hereinafter referred to as Supp. Tr.) and granted the parties an opportunity to present further briefs.

A comparison of appellants' later opening brief, filed on or about July 7, 1939, with appellants' earlier opening brief, filed on about November 30, 1938, discloses that most of it is a reprint of, or is a substantial restatement of, what already appears in their earlier brief. Such additional matters as appear therein will receive special attention hereafter. There would appear to be no necessity or good reason for appellee to reprint, or substantially restate, what has already been set forth in its earlier brief in answer to appellant's arguments and, accordingly, we shall hereinafter, in answering the points contained in appellants' later brief, confine ourselves, for the most part, to the appropriate pages of our earlier brief, adding, where advisable or necessary, new discussion or comment.

Error in Title of Cause on Appeal.

We note that the cover and introductory page of the Supplemental Transcript of Record later filed contain the same error in entitling the cause on appeal as appears on the cover and introductory page of the Transcript of Record originally filed herein. This error should be corrected in the manner indicated on page 2 of appellee's earlier brief.

Regarding Appellants' Jurisdictional Statement.

Appellants' jurisdictional statement, as contained in their later brief (pp. 2 to 6) is a reprint of the jurisdictional statement appearing in their opening brief (pp. 2 to 5), except for the narrative, commencing near the top of page 5, covering procedural matters subsequent to the hearing before the Circuit Court of Appeals on March 23, 1939.

In respect to this jurisdictional statement, we invite attention to what we have already said on pages 2 and 3 of appellee's earlier brief, to which we add our objection to appellants' statement, on page 6 of their later brief, that "the New Federal Rules of Civil Procedure are applicable to the above cause." We respectfully urge, as we urged at the very outset of appellee's earlier brief (p. 1), that, because of an order made by the trial judge upon application of appellants themselves [Tr. p. 162], pursuant to Rule 86 of these New Federal Rules of Civil Procedure, this appeal is governed by the procedural rules in force prior to September 16, 1938, the new rules, in the words of District Judge James, not being considered feasible to work justice in this action. Appellants having themselves elected to proceed under the old rules, and having obtained a specific court order therefor, are bound thereby and their appeal should be determined upon the transcript of record originally filed herein and upon the briefs of the respective parties originally filed herein. In this connection we refer to the typewritten brief filed by us pursuant to the order of the Circuit Court of Appeals made herein under date of April 20, 1939, which authorized counsel for the respective parties to file briefs, in typewritten form, by May 5, 1939, on the question of the applicability of the

new Rules of Civil Procedure for the District Courts of the United States to the above case, in the light of the decision of the Supreme Court of the United States in *McCrone v. United States of America,* decided April 17, 1939 (83 L. Ed. Advance Opinions 752). We respectfully repeat that, under the circumstances of this case, appellants are not entitled to relief from their procedural omissions and neglect by filing and relying upon a Supplemental Transcript of Record under cover of Rule 86 of the New Rules of Federal Procedure.

Statement of the Case.

The matter contained in appellants' Statement in their later brief (pp. 6 to 14) is largely a restatement of what appears under the same heading in their earlier brief (pp. 5 to 10), except for the urging of an additional point predicated upon the statement that "some of the findings of fact in the above cause are contradictory and contain, in the opinion of appellants, negative pregnants".

In reply we respectfully refer to what we have stated on pages 4 to 9 of appellee's earlier brief. As to the additional point concernings findings, we shall discuss it later on in this brief. For the time being, however, and in view of the fact that we now have before us a Supplemental Transcript of Record which, in conjunction with the Transcript of Record originally filed herein, gives us the entire record of the testimony and proceedings at the trial court and the exhibits introduced, we are in a position to set forth in fuller detail certain facts which are important to any Statement of the case on an appeal wherein the evidence justifying the trial court's decision is challenged.

An analysis of that record discloses the following:

The Bank was in financial difficulties—in that its capital was impaired—at least as early as February 1930. Lamm, the national bank examiner, found an impairment of capital when he made his examination on February 7, 1930, and immediately thereafter he took up with the board of directors ways and means of restoring this impairment [Supp. Tr. pp. 93 to 96, and 104]. Speaking of a board meeting, called after this examination he says:

> "We discussed the possible effect of an assessment, and finally talked about a contribution. The question was raised at that time, if the directors contributed money to the bank would there be any chance of them getting it back again. We devised a scheme whereby if they contributed to the bank what they would do would be to actually buy the depreciation in the bond account. That would give them a possibility of return of the money that they put in the surplus account or undivided profit account" (*ibid.* p. 94).
>
> "This 'buying the depreciation' was something new. You could always restore the capital of a bank by buying its bad assets" (*ibid.* p. 95).

The only time this method of repairing the impaired capital of a national bank had been used was about 1929 and that was in connection with another bank in his territory—the First National Bank of Huntington Beach, which was later merged into a state bank. It was his idea. The office of the Comptroller of the Currency never indicated approval of this as being a proper method to repair impaired capital nor did it notify disapproval to him (*ibid.* pp. 99-100-103).

On May 29, 1930, at a meeting of the board of directors of the appellee Bank, the following motion was adopted:

> "That a reserve fund be created by voluntary contribution of stockholders to offset depreciation in bond account, and that stockholders contributing will be reimbursed from said reserve fund which shall be built up by appreciation in the bond account or by any other earnings in the Bank" (*ibid.* p. 105).

In reply to correspondence with the Comptroller's office on this subject, the Deputy Comptroller under date of July 2, 1930 wrote to the Board of Directors in part as follows:

> "Receipt is acknowledged of the President's letter of June 11, advising that a contribution of $30,000 has been made by certain stockholders and that that amount, together with $10,000 from undivided profits, has been set up as a reserve against the depreciation in your bond account which, according to a recent appraisal, is said to amount to $39,076.
>
> "The report of an examination of the bank, completed on February 7 by National Bank Examiner R. Foster Lamm, showed depreciation of $59,991.88
> . . .
>
> "From the resolution, a copy of which was incorporated in the President's letter, it does not appear that the contribution was made under such terms and conditions as to provide for the impairment. It appears on the contrary that those who supplied the funds for the 'contribution' are to be reimbursed out of the earnings of the bank. If the understanding is that the 'contributors' are to be reimbursed by the bank, there has merely been a substitution of sound assets for losses and a corresponding in-

crease in liabilities so that the difference between the value of sound assets and the amount of liabilities is not different from what it was before the funds were paid into the bank. It is then the position of this office that the impairment of capital, shown in the examiner's report, still exists with such changes as may be warranted by changes in the values of assets.

"*An impaired capital may be restored in the manner prescribed by Section 5205 involving an assessment of the stock. If restoration of the capital in the manner provided by that section is not desired, restoration may be accomplished through voluntary and unconditional contributions to the bank, or by the purchase for cash of the assets estimated by the examiner as losses.* Contributions of cash or purchases of assets to eliminate an impairment of capital *must,* however, be unconditional and there *must* be no obligation on the part of the bank to repay the contribution or to repurchase the assets should they prove uncollectible. . . .

"You are advised, therefore, that unless advice is received shortly that the 'contributions' referred to in the President's letter of June 11 have been voluntarily made without any conditions whatever as to repayment by the bank, the losses shown in the examiner's report will not be regarded as having been provided for . . ." (Italics ours). [Supp. Tr. pp. 87 to 90.]

According to bank examiner Lamm, this letter of the Deputy Comptroller is composed of "more or less stereotyped paragraphs" representing the policy of the Department, and that it was the general instruction or advice with which he was familiar (*ibid.* p. 98).

This letter was brought to the attention of the meeting of the board of directors held on July 16, 1930, the minutes of which state:

> "Letter from the Treasury Department, addressed to the Board of Directors of the Anaheim First National Bank, dated July 2nd, 1930, was read and the President was instructed to reply to this letter, copy of which reply is being held on file at this Bank."

This letter remained in the files of the Bank and was incorporated into the minute book itself (*ibid.* pp. 25 and 106).

President Dolan's reply to the Deputy Comptroller dated July 17, 1930 stated:

> "In reply to your letter will say that under date of July 16, 1930, the following agreement was signed by the stockholders of this Bank who contributed the sum of $30,000, which amount was placed in a reserve account for depreciation of bonds:
>
> "The undersigned stockholders of the Anaheim National Bank, having contributed the sum of $30,000, which amount was placed in a reserve account with said bank for the purpose of covering a partial depreciation in the Bond Account of said Bank, have made said contribution with the understanding that we have purchased the depreciation in the Bond Account and do not hold the Bank responsible for repayment of above amount" (*ibid.* p. 91).

By the fall of 1930 Mr. Lamm had left the district, having been succeeded by Mr. Waldron as examiner for the district (*ibid.* p. 96). Ever since that time Waldron has been such examiner (*ibid.* p. 176).

Waldron recalls that late in 1930 there was a program still in process of possibly increasing the capital

stock of the Bank and selling the stock at a premium to take care of the depreciation in the bond account, but that program did not go through. He discussed with the Bank officials the matter of its impaired capital, for the first time probably immediately after or during his examination of the Bank in December 1930 (*ibid.* p. 177). Mr. Dolan told him of a plan which would be in the nature of a voluntary payment, but along the line of a purchase of bond depreciation (*ibid.* pp. 177-179).

On June 18, 1931 the Board of Directors held a meeting at which a motion was carried that a committee be selected to collect $175.00 per share from stockholders, to be used to purchase depreciation in the bond account (*ibid.* p. 17).

Under date of June 26, 1931 President Dolan wrote to the Deputy Comptroller (who had apparently been prodding the Bank on the subject of the Bank's capital stock) as follows:

> "Replying to your letter of June 19, 1931, regarding proposed increase in the bank's capital stock, will say that we have decided not to increase the stock at this time. Under date of June 18, 1931, at a meeting of the directors of the Bank, it was agreed that the directors and other stockholders would cover the depreciation in the bond account, and raise the amount necessary for this purpose at once.
>
> "Will also state that we were examined by National Bank Examiner Waldron on June 22nd, 1931, and he recommended and approved the above plan.
>
> "Will notify you as soon as the amount necessary to cover the depreciation in the bond account has been raised.

> "Trusting that this is satisfactory and meets with your approval . . ." (*ibid.* p. 78, Plaintiffs' Exhibit 3).

Waldron says he had never heard of buying depreciation of a bond account as a method of curing impaired capital; this was his first acquaintance with it; and he has never heard of it with reference to any other national bank. As to it being a feasible plan he testified:

> "I said that it might—essentially, that it might be possible; but that it also might be open to attack by the Comptroller's office" (*ibid.* pp. 177-179).

At his request a director's meeting was held about the middle of July 1931, at which he attended (*ibid.* 179-180). As to the discussion at that meeting:

> "Well, a considerable part of the money, or possibly all of the money that was eventually raised had been raised at that time. The matter of how the bookkeeping would be arranged, I recall that I was very insistent that if this plan of purchase of bond depreciation would go over, there must be a very definite method of bookkeeping as to the particular bonds, the depreciation in the particular bonds that were purchased; and if there was any exchange, that the record follow clearly through, if there was any break in the record, and certainly if otherwise they could recover their money, they would not be able to unless they kept a very clear record" (*ibid.* pp. 80 and 81).

He examined the Bank's books at regular six-months intervals thereafter. He does not think they ever kept such a record on the official books of the Bank. He never

received from the Comptroller's office any approval of this method of buying the bond depreciation, and he never represented to any of the officers or directors or anybody connected with the Bank that this plan was approved by the Comptroller and would be agreeable to the Comptroller (*ibid.* pp. 180-182). Neither the receiver nor his assistant found, after the Bank was taken over by the receiver, any records showing any segregation in respect to bonds or any lists made each six months or at other stated intervals; and the bond account was kept just the same after as before June 24, 1931 (*ibid.* pp. 183-184).

Examiner Lamm himself did not remember whether the proposed method of repairing the impaired capital by buying bond depreciation was ever put into practice by the Bank during the period when he was examining because he passed out of the picture (*ibid.* p. 102).

In any event at the meeting of the Board of Directors held July 17, 1931, a resolution was passed as follows:

> "Resolved, that the $115,650 which has been paid in by stockholders at the rate of $175.00 per share for the purchase of bond depreciation, and the $25,000 now held on books of the Bank in Reserve Account, be applied as follows:
>
> "Take up five notes of $6,000 each formerly placed in Bank's assets by certain stockholders on account of bond depreciation.
>
> "The balance of said amount to be applied directly against the Bond Account of this Bank on account

of estimated depreciation, which will reduce the present total of Bond Account by $110,650. Be it further resolved as further payments be received from stockholders on account of purchase of bond depreciation, that such sums shall be applied on Bond account as above specified" (*ibid.* pp. 19-20).

It will be remembered that this subscription document, or whatever it may be called, was worded as follows:

"In compliance with action of the Board of Directors taken at a meeting held June 18, 1931, recommending that stockholders pay into a fund for the purchase of bond depreciation a sum equal to $175.00 for each share owned, the undersigned hereby subscribe to such fund in the amount set opposite our names.

"It is the intention that interest received from bonds equaling the amount of depreciation purchased be set aside for the use of the undersigned. The appraisal of the bond list shall be made each six months and should a decrease in the depreciation be shown, the amount shall be divided pro-rata among the stockholders who purchased depreciation in bond account" (then follow signatures and sums) (*ibid.* pp. 80-81).

Under date of August 20, 1931, the Deputy Comptroller wrote to the Board of Directors of the Bank in part as follows:

"A capital impairment of $94,400.53 was shown by National Bank Examiner W. J. Waldron in his

report of an examination of your bank completed June 24, which it is understood has been provided for by voluntary and unconditional contributions of directors and shareholders. The contributions up until July 17, 1931 are reported to have amounted to $115,650.00. . . .

"Please write this office on September 1 and advise whether the committee appointed to collect from stockholders has succeeded in making the additional collections, and submit a list showing the individual cash contributions, and the contributions that have been made in the form of notes. . . .

"Also please have executed and forwarded the enclosed form marked 'affidavit' certifying to the fact that capital has been restored to $75,000.

"Although you have been previously advised in this regard this office wishes to bring to your attention again at this time the fact that contributions made to restore capital should be made unconditionally and without expectation of reimbursement. Please advise in your reply to this letter that you have the correct understanding in this regard . . ." (*ibid.* pp. 41-42). (Italics ours.)

Under date of September 8, 1931, President Dolan wrote to the Deputy Comptroller in part as follows:

"We have your favor of August 20 and wish to make the following reply to your letter of the above date.

"Regarding the amount of $94,400.53 which was shown by the National Bank Examiner as being a

capital impairment, will say that the above amount was estimated on account of an estimated depreciation in our bond account. The following stockholders purchased the depreciation with the understanding that the bonds were to be held or exchanged with a view of the same liquidating the amount subscribed:"

(Here follow names and amounts)

* * * * * * * * *

"We enclose form marked 'affidavit' certifying to the fact that capital has been restored to $75,000 . . . ." (*ibid.* pp. 43 to 46).

In the minutes of the regular monthly meeting of the Board of Directors of the Bank held September 17, 1931, there is the following entry:

"A letter from the Treasury Department dated Aug. 20th and Mr. Dolan's reply thereto dated September 8th were read and ordered filed" (*ibid.* p. 187).

Under date of October 30, 1931, the Deputy Comptroller again wrote to the Board of Directors of the Bank, in part as follows:

"Referring to the president's letter of September 8 . . .

"It should be clearly understood by all parties concerned that these contributions are voluntary

> *and unconditionally made, with no expectation of reimbursement from the profits or earnings of the bank . . .*" (*ibid.* p. 56). (Italics ours.)

In the minutes of the regular monthly meeting of the Board of Directors of the Bank held on November 19, 1931, we find the following entry:

> "A letter from the Comptroller under date of October 30th was read and it was directed that a reply be made thereto" (*ibid.* p. 50).

Under date of November 20, 1931, President Dolan wrote to the Deputy Comptroller, advising him that his letter of October 30, 1931 had been read to the Board of Directors at its meeting held on November 19th (*ibid.* p. 57).

It is also to be noted that at the annual meeting of stockholders of the Bank held on January 12, 1932, the following resolution was adopted:

> "That all and singular actions of the officers of the bank for the past year be and they are hereby ratified, confirmed and approved" (*ibid.* p. 193).

To Mr. Tuffree, a stockholder and director, the following question was put:

> "Q. And these sums of money were raised for the purpose of keeping open the bank and not having the Comptroller close it down or take it over or administer it through a Receiver, is that not the fact?"

To which he replied:

> "A. That was the purpose, as I remember it" (*ibid.* p. 67).

The record of this case discloses that no notice or reply was ever sent to the Comptroller stating that he was under a misapprehension if he thought that these sums were voluntary and unconditional contributions, made without expectation of reimbursement. Never, it appears, was a copy of this subscription document (Plaintiffs' Exhibit 4) sent to the Comptroller. Nor apparently (*ibid.* p. 97) was it ever referred to examiner Lamm for his advice or consultation.

In their later brief (p. 8) appellants are obliged to admit that the money subscribed during or about June 1931 was subscribed "under like circumstances" as the above referred to money subscribed in 1930. If so, they were amply forewarned of the unconditional and voluntary character of such contributions. This negatives the statement made in their earlier brief (p. 8), and repeated in their later brief (p. 9), that "The first notice received by the directors and stockholders of the bank that the Comptroller's office viewed their subscriptions as a purchase with distaste, and felt that the money already paid in should be a voluntary contribution was subsequent, to-wit, August 20, 1931, some time after they had paid in the amounts subscribed by them."

We shall reserve for comment—in connection with our reply to part VII of appellants' brief—appellants' challenge (pp. 11 to 14) of certain findings of fact.

Reply to Appellants' Summary of Their Argument and Points of Law.

(1) Under point 1 of their earlier brief (p. 11) appellants apparently took the position that the contributions made by the stockholders and directors were made with the intent to enter into an agreement with the Bank that their contributions were a loan. In their later brief (pp. 14 and 15) they appear alternately to assert and then abandon this position, at times taking the position that the intent was to enter into an agreement to purchase the depreciation in the bond account. Here they attempt to assimilate this purchase of depreciation in the bond account to the purchase for cash of assets of the Bank which the bank examiner has condemned as losses—which latter is a recognized method of restoring impaired capital. We repeat here—what we have stated in our earlier brief (p. 10)—that we are unable to fathom the startling result claimed by appellants and stated thus: "This creates a conclusive presumption as against the appellee that such a method of repairing impaired capital losses was valid and satisfactory to the Department." The authority cited sustains no such point.

(2) Point 2 of appellants' later brief (p. 15) is a reprint of point 2 of their earlier brief (p. 11), and accordingly we respectfully refer to what we have stated in answer to that point on page 10 of our earlier brief.

We must add, however, what is very clear from the Supplemental Transcript, namely, that the Comptroller did not, as appellants infer, merely indicate that contributions to repair impaired capital should be voluntary and without expectation of reimbursement. He insisted that they "must" be so, using the very word "must" in his letter

of July 2, 1930 [Supp. Tr. p. 89]. The adjudicated cases, without exception, support him.

(3) Point 3 of appellants' later brief (p. 16) and the authorities cited in support thereof are a re-print of what is set forth under point 3 of their earlier brief (p. 12); and accordingly we respectfully refer to what we have stated in answer to that point on page 11 of our earlier brief.

(4) Point 4 of appellants' later brief (p. 16) and the authorities cited in support thereof are a re-print of what is set forth under point 4 of their earlier brief (p. 12); and accordingly we respectfully refer to what we have stated in answer to this point on pages 12 and 13 of our earlier brief.

(5) Point 5 of appellants' later brief (p. 16) and the authorities cited in support thereof are a re-print of what is set forth under point 5 of their earlier brief (p. 12); and accordingly we respectfully refer to what we have stated in answer to this point on page 14 of our earlier brief.

(6) Point 6 of appellants' later brief (p. 17) is new in form but is in substance and effect a re-statement of what appears in the latter part of their earlier brief (pp. 27 and 28). We shall reserve this point for discussion hereinafter in replying to part VI of the Argument in appellants' later brief.

(7) Point 7 of appellants' later brief (p. 17) is likewise new in form and not to be found in appellants' earlier brief, unless what is set forth on page 29 of said earlier brief is to be considered as bearing upon the subject. We shall reserve this point for discussion hereinafter in our reply to part VII of the Argument in appellants' later brief.

Reply to Appellants' Preliminary Observations.

The Preliminary Observations set forth in appellants' later brief (pp. 18 to 20) are largely a re-statement of what appears in their earlier brief (pp. 13 and 14); and accordingly in reply thereto we refer to pages 15 and 16 of our earlier brief. We note that here again in their later brief appellants have alternated their views as to the character of the subscriptions. Whereas in their earlier brief they contended that the evidence showed "the intent to make such contribution as a loan to the bank" (p. 13), they now merely urge the evidence shows "the intent of being reimbursed" (p. 18).

In this connection we must again draw attention to the fact that—contrary to appellants' reiterated intimations that there was no definite prohibition against loans to the Bank to restore its capital and that the Comptroller merely said that they *should,* rather than that they *must,* be made unconditionally and without expectation of reimbursement—the whole record which is now before this court shows clearly that there was a definite requirement and policy prohibiting loans or contributions with strings attached to them. This is obvious from the letters of the Deputy Comptroller to the Bank under dates of July 2, 1930, August 20, 1931 and October 31, 1931. As the Deputy Comptroller says:

> "If the understanding is that the 'contributors' are to be reimbursed by the bank, there has merely been a substitution of sound assets for losses and a corresponding increase in liabilities so that the

> difference between the value of sound assets and the amount of liabilities is not different from what it was before the funds were paid into the bank" [Supp. Tr. 88].

Here again appellants are constrained to admit that the transaction in 1930 was "one involving exactly the same circumstances" as the transaction in 1931 (App. Later Br. p. 19).

Appellants in their later brief (p. 19) state that the Comptroller at no time voiced disapproval of the refund to the contributing stockholders of the sum of $30,000.00 contributed in the 1930 transaction. In the first place, where does it appear that he knew of such refund? Right from the beginning in 1930 he had made it clear that this $30,000.00 had to be voluntary contribution, without strings attached to it; and as a matter of fact the original plan of the directors which called for reimbursement [Supp. Tr. p. 105] had to be and was revamped accordingly [Supp. Tr. p. 91]. The Bank had actually furnished the Comptroller with an affidavit certifying to restoration of capital [Supp. Tr. p. 46]. It is clear that the whole communicated policy and attitude of the Comptroller was against reimbursement of $30,000.00, if such implied a diminution of the assets of the Bank; and certainly if the Bank, through its lack of frankness in its dealings with the Comptroller's office, lulled that office into a sense of security that the impairment had been repaired, whereas in fact it had not, the Bank has no standing in court or conscience to take advantage of such a deception. We must remember that banks are in a special relationship to the public, whose interests are prime and controlling.

I.

Reply to Part I of Appellants' Argument.

Part I of appellants' argument as appearing in their later brief (pp. 20 to 23) is substantially a re-statement of what appears in part I of the argument in their earlier brief (pp. 15 to 20); and accordingly in reply we refer to what we have stated on pages 17 to 33 of our earlier brief.

We note that, whereas in their earlier brief (p. 18) appellants made the frank statement that "The contributions were made solely for the benefit of the bank and in order that the bank could remain open and not be declared insolvent," they limit the statement in the later brief (p. 20) to this, that "The subscriptions were made solely for the benefit of the bank," adding thereto that such subscriptions were made "pursuant to the instructions and information given to them direct from the Department in the letter from C. H. Gough, Deputy Comptroller of the Currency, under date of July 2nd, 1930, that they might purchase for cash assets estimated by the examiner as losses." This addition may sound plausible but we are not to be misguided thereby. Cash assets estimated by the examiner as losses are tangible, definite things, as, for instance, "sour" promissory notes or securities of debased value. Having been carried at a certain valuation the Bank Examiner determines that they cannot be carried at that valuation any longer and must be eliminated or reduced as assets. Thereupon persons interested in the Bank may, if they wish to avoid correcting the condition by the assessment method or by the cash contribution method, buy such assets at the valuation at which they have been carried on the books of the Bank, thereby substituting good assets for bad assets.

The bad assets then wholly pass out of the Bank's portfolio. This purchasing of the "sour" notes or debased securities is quite different from buying the so-called "depreciation in the bond account"—which, we submit, is intangible, indefinite and impractical under the circumstances. It was not what the Comptroller meant when he stated that impairment of capital could be corrected by purchasing for cash assets estimated by the examiner as losses.

In this connection it is important to recall that after appellants' so-called purchase of said depreciation in the bond account, the bond account was carried on the Bank's books and in the Bank's public statements precisely the same as it had been carried before such alleged purchase, the Bank, so far as the public and the Comptroller were concerned, being represented as possessing and owning bonds of such-an-such a value, without condition or limitation whatsoever attached thereto.

II.

Reply to Part II of Appellants' Argument.

Part II of appellants' argument as set forth in their later brief (pp. 24 and 25) is a re-print of what appears in part II of their argument in their earlier brief (pp. 23 and 24); and accordingly in reply we refer to what we have stated on pages 34 to 37 of our earlier brief.

In this connection we again point out, what we have already adverted to, namely, that with the entire record before us it is clear that prior to the date of the 1931 transaction the Comptroller had cautioned the Bank that contributions to repair impaired capital must be consid-

ered as voluntary and unconditional. As to appellants' contention that the 1930 transaction was a totally different transaction—it may have been different in time but it was certainly not different in character. Appellants themselves admit in their later brief (p. 19) that the 1930 transaction was one "involving exactly the same circumstances" as the 1931 transaction.

III.

Reply to Part III of Appellants' Argument.

Part III of appellants' argument as set forth in their later brief (p. 26) is a composite of argument III in their earlier brief (p. 25) and point 3 of their Summary of the Argument and Points of Law in said earlier brief (p. 12). Much of what we stated on pages 11 and 38 of our earlier brief is applicable in reply. The bond account—valued at about $384,000 in latter June, 1931 [Supp. Tr. 153]—actually became worse thereafter, because it suffered a further depreciation, upon sales and disposals in liquidation, of about $136,400 net (*ibid.* p. 188). The trial judge, whose province it was to pass upon the evidence, did so and made his finding adverse to appellants in this connection.

The important thing to bear in mind, however, is that the trial judge found, contrary to appellants' contentions, that on or about July 17, 1931 the respective appellants paid in cash, or gave notes for, sums aggregating $115,-650, as voluntary and unconditional contributions to the Bank, without any obligation whatsoever on the part of the Bank to repay same; that these payments were made to repair the impaired capital of the Bank; that on various occasions between July 1930 and November 1931 the Comptroller of the Currency notified and instructed the

Bank, its officers and directors, that payments made to repair the impaired capital of the Bank must be considered voluntary and unconditional contributions, without obligation of repayment; that appellants acquiesced in this notification and instruction; that it was not true that, by reason of the appointment of a receiver and the liquidation of the Bank's assets, there had been any failure of consideration; that none of the claims filed by appellants against the Bank are valid; and that while said sums have not been repaid to any of appellants, it is also true that the Bank is in no way obligated to repay same (see findings V, VI, IX, X and XI). It has been determined that appellants' contentions as to their alleged agreement are not the real facts of the situation, and accordingly, even assuming an appreciation in the bond account, they would not be entitled thereto.

IV.

Reply to Part IV of Appellants' Argument.

Part IV of appellants' argument in their later brief (p. 27) is in part substantially a re-statement of what they set forth under point 4 of their Summary of Argument and Points of Law in their earlier brief (p. 12), with the addition of the following statement:

> "There is no way at this late date, in fact there is no way at all, of telling whether or not the bonds were liquidated at the best price which the market would bring, but we do know that by their liquidation the appellants were deprived of the sole consideration for which they paid their money."

In other words, appellants re-assert that there was a failure of consideration.

In reply we refer to what we have said on pages 12 and 13 of our earlier brief, and we again repeat what we have emphasized in our earlier brief, namely, that the real consideration for which these sums were contributed was to continue the Bank as a going concern. It continued as a going concern for approximately two and one-half years thereafter. This was ample consideration, as authorities such as the following, cited in various parts of our earlier brief, clearly show:

> *Delano v. Butler, Receiver of Pacific Nat. Bank,* 118 U. S. 634;
>
> *Coast Nat. Bank v. Bloom,* 174 Atl. 576 (N. J.);
>
> *Wright v. Gurley,* 63 So. 310 (La.);
>
> *Interstate Trust & Banking Co. v. Irwin,* 70 So. 313 (La.);
>
> *Union Bank of Brooklyn v. Sullivan,* 108 N. E. 558 (N. Y.).

There is an interesting annotation in 95 A. L. R., p. 534, which discusses consideration for notes given to make good the depleting of the capital of a bank, including the subjects of failure of consideration, at page 542, and estoppel, at page 543, in connection therewith.

It is clear there has been no failure of consideration, the Bank having remained open for two and one-half years after this restoration of impaired capital; and even if there were a failure of consideration appellants, as a matter of necessary public policy, would be estopped to assert it.

V.

Reply to Part V of Appellants' Argument.

Part V of appellants' argument as set forth in their later brief (p. 28) is based on point 5 set forth in their earlier brief (p. 12), with the preliminary statement that their alleged agreement entered into with the Bank "in compliance with the meeting of June 18, 1931, was recognized as a valid agreement from that time until the receiver was appointed, three years later."

In reply we have this to say:

As to recognition of the validity of the alleged agreement, there certainly never was such recognition by the Comptroller of the Currency. The officers of the Bank never even furnished the full text thereof to the Comptroller and, as is obvious from the correspondence, the Comptroller's office at all times assumed that the sums paid in were voluntary and unconditional contributions. How the stockholders and officers *inter sese* may have regarded the alleged agreement is wholly immaterial. It is, under the cases, even immaterial how the Bank Examiner may have regarded it. We are here concerned with special rules and policies predicated upon the circumstance that this Bank was a national bank, and thus a sort of public institution.

The difficulties respecting the claims presented to and filed with the receiver were difficulties not of formality but of substance. Formal claims had indeed been presented to and filed with the receiver, but such formal claims could rise no higher than the legal basis upon which they were founded, and there being no legal basis for them, they were not valid or proper claims. The trial court, having heard the evidence, found that while such

claims had been filed, they were not valid or proper claims (Finding IX). This was necessarily so in view of other findings adverse to appellants.

The case of *Eisele v. First Nat. Bank,* 137 Atl. 827, cited by appellants, has already been discussed by us on page 14 of our earlier brief.

VI.

Reply to Part VI of Appellants' Argument.

Part VI of appellants' argument as set forth in their later brief (p. 29) is substantially the same as what is set forth at the bottom of page 27 and at the top of page 28 in their earlier brief.

We are unable to fathom how appellants have reached the conclusion that "under no theory could the appellee retain the amount of the subscriptions of appellants herein under an unlawful contract made in contravention of statute." They seem to assume that appellee's sole theory on defense was: that a contract was indeed made between the stockholders and the Bank in 1931 but that such contract was unlawful. The question of unlawfulness arose only incidentally. Appellee contended that appellants were not entitled to recover herein on the basis of any agreement of the sort and effect urged by them in their complaint, and that if in fact an attempt had been made to meet the Bank's precarious financial situation by the method provided for in such alleged agreement, the same would have been unlawful because contrary to public policy and the rules governing the administration of national banks, and that under the circumstances of the case appellants would be estopped to set up such an agreement as a basis for recovering their contributions.

As appellants lay special stress on this part of their argument—which must be considered in conjunction with point 6 of their Summary of Argument and Points of Law (Apps. later Br., p. 17)—we feel it should be given particular attention.

In the first place, let us analyze the five cases cited by appellants (*ibid.* p. 17). They constitute five of the nine cases cited in the later brief and not appearing in their earlier brief. Four of them—*Silverthorn v. Percy,* 120 Cal. App. 83, *Butterfield Const. Co. v. Federal, etc.,* 5 Cal. App. (2d) 16, *Teachout v. Bogey,* 175 Cal. 481, and *Moffatt v. Boulson,* 96 Cal. 106—merely stand for the proposition that one cannot enforce, or recover damages predicated upon, a void or illegal contract. They say nothing about being entitled to be replaced—so far as reimbursement is concerned—in *status quo ante.* In our case appellants are seeking reimbursement, or what is analogous thereto. The fifth case—*Wood v. Imperial Irr. Dist.,* 216 Cal. 748—when properly interpreted is rather in favor of appellee than appellants. In that case the Superintendent of Banks sued the District, a depositor of a closed bank, to recover the proceeds of certain securities which the bank, under an unlawful agreement in connection with a deposit by the District, delivered to the District as security for such deposit. The court held that "the deposit was not forbidden by law, but . . . the giving over of the bonds as security for the deposit was unlawful" (p. 761). The Superintendent was held entitled

to recover the proceeds of the bonds. The court referred to the matter of public policy, in part saying, at page 761:

> "Banks publish statements of their assets and individuals deposit on the faith of these published statements. It is well known that good statements as to assets induce people to deposit their money in banks making such statements. It would be a crowning act of injustice to hold that deposits thus induced are nevertheless cut off from sharing in these assets until some unknown favored few, who have been secretly secured, are satisfied; and it would be a palpable fraud on the part of a bank thus to procure deposits when its assets were secretly pledged . . . We are unwilling to hold that a bank, in the absence of some statutory authority, may exercise a right or power which would enable it to perpetrate a fraud upon any of its depositors."

The following cases are, we believe, determinative of the point, adversely to appellants.

In *Reed et al v. Mobley, Superintendent of Banks,* 157 S. E. 321 (Ga.), where certain stockholders of a closed bank asserted that sums paid by them—under a special agreement set forth in the decision—to restore the impaired capital of the bank should be set off against their stockholders liability or should be declared impressed with a trust and refunded to them, the court held that:

> "Any agreement between the bank and its stockholders, by which the latter should not be required, in the event the superintendent of banks took it over for liquidation, to pay assessments levied against

them on their stock for the purpose of paying depositors, if they had paid their assessments to make good the impaired capital stock, was illegal and void; and such stockholders would not be entitled to recover from the bank, or the superintendent of banks, when it had been taken over by this officer for liquidation, amounts so paid by them on the assessments against their stock. Markus v. Austin, *supra*; Austin v. Fleming (Tex. Civ. App.), 290 S. W. 835; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Scoville v. Thayer, *supra*; Austin v. Connellee (Tex. Civ. App.), 292 S. W. 613." (Page 326.)

In *Utley v. Clarke,* 16 Fed. Supp. 435, the plaintiff sought to recover the market value of certain bonds loaned by him for the purpose of repairing the impaired capital of a bank which later went into liquidation. The court said, at pages 439 and 440:

"While, if the bank were solvent and a going concern, plaintiff might recover, he cannot recover when he has been party to a deception upon the depositors and creditors of the bank and upon the Comptroller of the Currency when the bank becomes insolvent and his securities are taken by the receiver. He is estopped from asserting his claim as against depositors and other creditors." (p. 439.)

"It is quite true that plaintiff may not have fully realized the effect of the way in which the loan transaction was carried on. He in all probability left everything to Clarke (the bank president). That, however, does not excuse him.

> "Nor could plaintiff recover against the bank if Clarke failed to carry out representations made to plaintiff of the manner in which the transaction would be handled. Plaintiff made Clarke his agent for the purpose of using the $25,000 to aid the bank to show unimpaired capital and to remain open. If Clarke failed to do it in the way agreed upon or which plaintiff expected, plaintiff cannot put upon the bank the duty of seeing that it was done as agreed. Federal Reserve Bank v. Crothers, 289 F. 777, 779, *supra.*" (p. 440.)

In *Fallgatter v. Citizens' Nat. Bank,* 11 Fed. (2d) 383, it appeared that the plaintiff, a stockholder of defendant bank, paid into the bank, for the purpose of charging off worthless paper and making good a capital impairment, a certain sum pursuant to an assessment agreement made at a directors and stockholders' meeting. This sum, along with similar sums of other stockholders, was to be placed in a special fund, earmarked for making good such impairment, and called "Special Assessment Account" on the ledger of the bank. It was not to be used for any other purpose than the payment of an assessment of 100 per cent, if and when a formal notice of impairment was received from the Comptroller of the Currency. No formal notice of impairment was ever received and the money was in fact mingled with the general funds of the bank and used for the same purposes as the funds of other depositors. The detailed facts, as set forth in the court's opinion, should be read. The bank eventually went

into receivership and the plaintiff stockholder sued the bank and its receiver to recover the amount of the assessment so paid in by him. He was not allowed to recover. Of interest is this, among other statements by the court:

> "Even if the plaintiff and the other directors had the right originally to insist that the funds contributed by them be held itnact, and only released upon the conditions outlined in the ledger sheet, it was a right which they could waive. They controlled the bank and had access to it at all times. It was their business to keep in touch with it, knowing of its precarious condition. There would be a strong inference that the officer in charge acted properly and with authority. It does not seem possible that the plaintiff can now claim, under all the circumstances, that his bank, without his knowledge and consent, misappropriated a special deposit made by him. The purpose of the assessment was so clearly to immediately increase the solvency of the bank, which a special and conditional deposit would not have done, that a court would not be justified in finding to the contrary." (Page 385.)

There is, we believe, considerable analogy between cases such as the above and cases wherein stockholders, when sued on their statutory double liability, seek to avoid same by setting up, as a defense, some sort of agreement with the bank, its officers, or the bank examiner or Comptroller, the effect of which would be to release them, in whole or in part, from their said statutory double liability. In these cases it is uniformly held that such an agree-

ment is unlawful and void and cannot be asserted as a defense, even though the stockholder has, believing it to be lawful, fulfilled his part of it. For instance, take the case of *Page v. Jones,* 7 Fed. (2d) 541, wherein the court says at page 545:

> "There is no foundation for the claim that the defendant is relieved of his statutory liability to his creditors by the alleged fact that he was deceived and defrauded into paying his 110 per cent. into the bank by the false and fraudulent representations of its officers and directors relative to its prospective financial condition and the legal effect of that payment. The creditors of the bank were not responsible for the acts or representations of the officers and directors of the bank to their shareholders, and if they defrauded the shareholders their remedy is against them, and not against the creditors of the bank and their creditors. Ryan v. Mt. Vernon Nat. Bank, 224 F. 429, 140 C. C. A. 123; Blakert v. Lankford, 74 Okl. 61, 176 P. 532."

See also *Markus v. Austin,* 284 S. W. 326 (Tex.) where the state commissioner of banking and the defendant stockholder of a bank entered into an agreement that, on payment of an assessment restoring impaired capital, the stockholder would not be held liable for his statutory double liability. This agreement was void as against the provisions of law and as a fraud on creditors of the bank. The amount of the assessment so paid could not, after the bank went into liquidation, be offset against the amount of the stockholders statutory double liability.

VII.

Reply to Part VII of Appellants' Argument.

Part VII of appellants' argument in their later brief (p. 30) is new. It is asserted that findings of fact V and X are contradictory and are in form in the nature of negative pregnants as to ultimate facts material to the cause of action. Appellants then cite authorities to the effect that a finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation, and to the effect that if one part of the contradictory findings would support the judgment and another part would necessarily upset it, then the judgment cannot stand.

Appellants are in error both in analyzing the findings of fact and in applying the law. They have plucked two findings—numbers V and X—from twelve findings, ignoring important findings affirmatively and specifically finding on ultimate facts.

In comparing the findings with the pleadings and issues it will be noted that there are certain specific findings that such-and-such things are "true", and there are other findings, mostly following the allegations of the complaint and not inconsistent with such specific findings, finding that such-and-such things are "untrue". There is clearly nothing wrong with this. Certain findings affirmatively establish facts supporting defendant's contentions and other findings incidental thereto negative plaintiffs' contentions. Were the findings solely in the form "it is not true" or "it is untrue" there might be some plausibility to appellants' argument, but the findings in the instant case were not solely in that form. The authorities cited by appellants involve findings simply negativing affirmative allegations of the pleadings without specific

findings as to what the facts were—in other words, without findings of the "it is true" sort; or they involve cases where findings of the "it is true" sort are directly contrary to findings of the "it is not true" sort.

The true rules of construction of findings are, we submit, these:

> "It is settled law that findings should be reconciled and every inference drawn therefrom will support the judgment":
>
> *Hartford v. Pacific Motor T. Co.* (1936), 16 Cal. App. (2d) 378, at 381.

> "It is a familiar rule, too well settled and fixed to require citation of authority to sustain it, that the findings of a trial court must be so construed as to support the judgment, if possible, and that any apparent inconsistency between different portions of such findings must be reconciled in such a way as will give effect to the judgment, where this can be done upon any reasonable construction and interpretation of the language":
>
> *Wagner v. El Centro Seed Etc. Co.*, 17 Cal. App. 387, at 389.

> "It is also the rule that findings are sufficient if they can be made certain by reference to the record":
>
> *Ethel D. Co. v. Industrial Acc. Comm.* (1934), 219 Cal. 699, at 708.

Appellants' objections to our findings seem to be predicated upon the combinations of "it is true" and "it is untrue" findings. In this connection we merely refer to the following from 24 *Cal. Jur.* 986:

> "The following findings have been upheld: that all of the allegations of a complaint are true and the

> denials and allegations of the answer are untrue, that the allegations of a complaint are untrue and those of the answer are true, that the allegations or denials of an answer are true or untrue, that allegations of certain numbered subdivisions of a pleading are true or untrue, . . ."

We invite attention to the case of *Ford v. Cotton* (1927), 82 Cal. App. 675, where the court made a finding that the plaintiff, acting under his brokerage agreement, brought defendant into immediate touch with a ready and willing purchaser, able to buy at defendant's price and on terms acceptable to him, and did thus procure for defendant a *bona fide* purchaser at the price and on the terms and conditions prescribed in the brokerage contract, and that the arrangement made was "suitable" within the contemplation of the contract. The defendant in his answer had averred that the only terms and conditions on which he and one Ratteree had agreed were as to the initial payment of $25,000.00, and that the terms as to the balance of the payments were never suitably arranged between himself and said Ratteree. The court says, at page 683:

> "Upon conflicting evidence the court finds specifically, however, that '*it is not true* that the only terms and conditions relative to said sale upon which the minds of the defendant and said Allen Ratteree met was upon the initial payment; that *it is not true* that the terms as to the balance of the payments were never suitably aranged between plaintiff and said Allen Ratteree.' In view of the language of the brokerage contract and the issues tendered by plaintiff's answer,

> the finding to the effect that the terms were agreed upon and were suitable is to be treated as a finding of an ultimate fact. Since the court found the ultimate fact in favor of plaintiff, it in effect found and concluded that contradictory probative declarations relied on by the defendant were untrue. (Tower v. Wilson, 45 Cal. App. 123, 124 (215 Pac. 542, 543).)" (Italics ours.)

Here we have both "it is true" findings joined up with "it is not true" findings, and the court found no objection thereto.

In the case of *Fritz v. Mills,* 170 Cal. 449, it was claimed that there was an absence of valid findings on material allegations in issue. The court says at page 458:

> "We think this claim is untenable. It is based on the theory that the finding that all of the allegations of the third amended complaint, 'in so far as such allegations are controverted by the answer of the defendants thereto,' are untrue, is wholly insufficient because, as it is claimed, it cannot be ascertained which of the various allegations of the complaint the court believed to have been controverted by the answer. We do not concede this theory to be correct but we find it unnecessary to determine the question. Other findings are clearly sufficient. The findings proceed to declare 'that all of the denials and allegations contained in the answer of the defendants to said third amended complaint are, and that each and every of them is, supported by the evidence and true.' This is an unusual form of expression, but its meaning is clear and unequivocal. If the denials are true, the allegations denied must be untrue. The statement

is therefore equivalent to a finding that each allegation of the third amended complaint is untrue, a form of finding which has always been held sufficient (McEwen v. Johnson, 7 Cal. 260; Moore v. Clear Lake, 68 Cal. 151, (8 Pac. 816). There are many other cases of like effect."

In *Lee v. Day,* 55 Cal. App. 653, the court says at page 654:

"The appellant quotes the finding attacked as follows: 'That all the allegations set forth in plaintiff's complaint are not true,' and argues that this is not a finding that '*no one* of the allegations of the complaint is true, but the finding is as to all collectively; that *all* are not true.' The respondent has failed to file a brief or argue the question raised by the appeal. Appellant, however, has fallen into error in quoting the finding. The finding contained in the transcript is as follows: 'That each and all the allegations set forth in plaintiff's complaint are not true'; then follows the finding 'that all the allegations contained in defendant's answer are true.' In McLennan v. Wilcox, 126 Cal. 52 (58 Pac. 306), the finding claimed to be insufficient was as follows: 'That each of the averments of the answer are not true.' The court held the finding to be sufficient. While the use of the word 'untrue' would have been more appropriate than the words 'not true,' the criticism of the finding of which complaint is made is somewhat hypercritical, and under the authority of the case cited the finding must be held sufficient."

In *Tower v. Wilson,* 45 Cal. App. 123, it is said at page 132:

> "It is not necessary that the findings of the court on material issues shall follow the pleadings. If the findings, taken together, are such that the court can say the ultimate facts necessarily result therefrom, they are sufficient. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the code relating to such matters are met. (Millard v. Legion of Honor, 81 Cal. 340, 342, (22 Pac. 864); Mott v. Ewing, 90 Cal. 231, 235, (27 Pac. 194).) In another case in which 'the cause of action was single, but was stated in different forms in the complaint: First, for money loaned; second, for money had and received; and the third count set out a contract in writing,' what was done under it, and an agreement 'to repay to plaintiff all moneys he had paid or advanced under said contract,' the supreme court said: 'Appellant specifies that the issues under the first and second counts were not found by the court. These counts were upon the same cause of action as the third, and it so appeared upon the face of the complaint. As they rested upon the same facts, the facts found include them.'
>
> ". . . The trial court did find, however, that Wilson was 'not indebted to plaintiff in the sum of $148,750, or any other sum, for or on account of so much money had or received . . . from plaintiff for the use, or benefit, of plaintiff, or at all.' This was a finding upon the ultimate fact, the amount, if anything, due from defendant to plaintiff (Jacobs v. Ludemann, 137 Cal. 176, 182, (69 Pac. 965)), and, we think, necessarily included the whole controversy. (Southern California Ry. Co. v. Slauson, 6 Cal.

> Unrep. 874, 876, (68 Pac. 107). See, also, Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 352, (123 Pac. 219).) It must receive such construction as will uphold rather than defeat the judgment predicated thereon. Whenever, from facts found, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. . . . In other words, the court having found the ultimate fact in favor of the defendants, in effect finds and concludes that the contra probative facts alleged by plaintiff are untrue In addition to the finding quoted, the court did find with great particularity that the transaction between plaintiff and Wilson was not as alleged, and testified to by plaintiff."

In sum and substance, therefore, we have, as a study of the record will disclose—and particularly findings V, VI, IX, X, XI and XII—specific findings that the contentions of the defendant were true, that the contentions of plaintiffs were untrue, that defendant was neither indebted to plaintiffs in respect to the causes of action predicated upon the alleged agreement or upon the causes of action predicated upon alleged money had and received (being an alternate statement of the same claim), that no evidence was presented proving appreciation in the value of the bonds and no evidence of any legal damage or loss sustained by plaintiffs, that the sums paid in by the respective plaintiffs were voluntary and unconditional contributions, without any obligation on the part of the Bank to repay same, etc. It appears to us that the findings are particularly complete, that they are far from involving negatives pregnant or contradictions, and that they are very clear and definite, and that if anything they are more complete than required by the rules of procedure.

VIII.

Reply to Part VIII of Appellants' Argument.

Part VIII of appellants' argument as set forth on pages 31 to 34 of their later brief is substantially a restatement of what has appeared in their earlier brief (pp. 26-28); and accordingly in answer thereto we refer to what is set forth on pages 39 to 46 of our earlier brief.

In this connection we invite attention to appellants' repetition in their later brief (p. 31) of the statement that "the appellants subscribed to the fund for the purchase of said depreciation *only as a loan to the Bank,* such moneys to be repayable to them by the Bank, if and when said bond account appreciated in value" (italics ours); that "it was not until subsequent to the time when they had already put up their money that the directors were notified by the Comptroller that this method *should* not be used" and "even then they were not definitely advised that such method *must* not be used"; and to the repetition of the statement (p. 32) that certain non-director stockholders "were never advised, nor in any way apprised, of the fact that the Comptroller's office at any time, or at all, whether prior or subsequent to the transaction in question, objected to their subscriptions being made in the form of a loan." It is difficult to understand how appellants can continue to insist on these matters in view of the record of the case—the explicit warnings of the Comptroller against the loan method, his statement that such method *must* not be used, and the circumstance that the officers and directors, being the representatives of the non-director stockholders, had at all times, prior and subsequent to the 1931 transaction, knowledge of the Comptroller's objections to the loan method.

It is to be noted that near the end of this part of appellants' argument they insist that they are "entitled to

an accounting from the receiver as to the proceeds of the bond account and are entitled to the proceeds now in the hands of the receiver from the disposition of said bond account." In reply to this it is, we believe, sufficient to invite attention to the fact that no accounting is asked for in the complaint nor was mentioned or requested at any stage in the proceedings until appellants filed their earlier brief in this appeal; that the complaint is merely predicated upon a definite sum of money allegedly owed in respect to an alleged agreement between the defendant Bank and the plaintiffs, which in the alternate form (causes of action Fifteenth to Twenty-eighth) is predicated upon the common count theory for money had and received by the Bank for the use and benefit of plaintiffs; and that the prayer prays for specific sums in favor of the respective plaintiffs against the defendant and contains no request for an accounting. The matter of equity relief was never brought to the attention of the lower court and the case was not tried, as is clear from the record, upon the theory that equity relief was being sought. As pointed out by us in our earlier brief, the action was filed as an action at law, was tried as an action at law, was appealed as an action at law, and such change in theory is not now permissible.

Again we repeat that the equities, if any are involved herein, are clearly in favor of the Bank which is now in receivership and liquidation for the benefit of outside creditors who obviously had no part in, or knowledge of, this 1931 transaction. We shall do no more than quote the following from *Heath et al. v. Turner, Special Deputy Banking etc. Commissioner,* 77 S. W. (2d) 9, at page 12:

> "Because of the notes executed by Heath and other officers and directors, the bank was permitted to continue business for nearly 3 years and by published

reports to hold itself out to the public as solvent. Regardless of the equities between the other stockholders of the bank and the makers of the notes, and the effect of the agreement as between them, a matter which it is unnecessary for us to determine, the agreement could not and did not operate to thwart and nullify the policy of the law to the prejudice of the creditors and depositors. They were entitled to have the capital stock remain unimpaired, and it was to this end that the notes were executed. The fact that the banking commissioner may have approved the notes with knowledge of the alleged agreement as to the condition upon which they were executed did not lend any effect to the agreement so far as the interests of the creditors and depositors are concerned."

And the following from *Andrews v. State ex rel. Blair, Superintendent of Banks,* 178 N. E. 581 (Ohio), at page 584:

"It is urged, however, that Andrews is entitled to have his rights measured by rules of equity. It is argued, first, that it having been agreed that the money would be applied upon the double liability, it becomes charged with a trust to be used for creditors exclusively, and, second, that it becomes an equitable set-off against that liability when later asserted. Equity has no such efficacy. Equity is only open to those who have just rights to enforce where the law is inadequate. Equity will not give validity to a transaction which is void at law. Equity will not disregard constitutional or statutory provisions. Applying these principles to the case at bar, equity will not disregard the rights of creditors in order to compel the superintendent of banks to observe an agreement he had no right to make. Those principles are so

well settled as to be axiomatic. Among the numerous cases which might be cited, three leading authorities are Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71, 37 L. Ed. 1044; Rambo *et al.*, Partners, v. First State Bank of Argentine, 88 Kan. 257, 128 P. 182; Colonial Trust Co. v. Central Trust Co., 243 Pa. 268, 276, 90 A. 189.

"In the instant case, the money paid in by the stockholders on August 5th was not kept separate from other funds of the bank. Its identity was immediately lost by becoming mingled with the general funds of the bank."

Finally, matters have been passed upon by the trial court, sitting without a jury, a jury trial having been formally waived. Under the well known rules of law, the trial court having passed on the weight of the evidence, and its findings supporting the judgment, this appellate court will not, we feel satisfied, disturb the judgment.

Conclusion.

We contend and urge that the judgment of the District Court should be affirmed.

Respectfully submitted,

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